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How Not to Resolve Moral Conflicts in Politics*

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I. INTRODUCTION

How should moral conflicts in politics be resolved? One way of answering this question is to begin by considering how not to resolve moral conflicts in politics. For example: avoid taking a conflict to court if possible. This is not always possible, and it would be better in any case to understand the advantages as well as the disadvantages of different responses to moral conflicts in politics.

If we can understand what is missing from the most commonly recommended responses to moral conflicts in politics, then we can construct a more defensible response, one that captures the strengths while avoiding the weaknesses of the other ways. In this Essay, I will not start from scratch in constructing such a response. Rather, I will draw upon the conception of deliberative democracy that Dennis Thompson and I defend in *Democracy and Disagreement*, pursuing parallels between our conception and insights of dispute resolution.¹

What is a moral conflict in politics? A moral conflict in politics is any public controversy where important interests or ideals of many individuals are at stake and some public institution is called upon to render a decision or a series of decisions in order to resolve the conflict. Most political controversies are moral conflicts.

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¹ See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 1-2 (1996).

There are three theoretically prominent frameworks for resolving moral conflicts in politics that I discuss in this Essay, each of which helps to highlight elements of a more defensible framework. The first framework is procedural: let the majority decide. The second is substantive: maximize social welfare. The last is also substantive, but it rejects the second: protect individual rights.

An examination of the logic of these three frameworks for resolving moral conflicts in politics helps highlight an important weakness that all three share in common. They all neglect the value of deliberation. They do not explicitly recognize the value of engaging in a give and take of arguments and understandings before making a political decision. Deliberation is a value that theorists of dispute resolution rightly take seriously for some of the same reasons that political theorists also should explicitly value the role of deliberation in a framework for responding to moral conflicts in politics. As I discuss below, the value of deliberation in resolving moral conflicts is both instrumental and noninstrumental; deliberation helps parties to a moral conflict arrive at more morally defensible resolutions, and it also expresses the basic democratic value of mutual respect among free and equal citizens.

A second problem with the three major frameworks in political theory that I explore below is shared by some of the dominant frameworks of dispute resolution. The three frameworks neglect the need to combine morally defensible conditions (or what is commonly called "process") and morally defensible content (or what is commonly called "substance") when responding to a moral conflict in politics.² Moral conflicts are best resolved by a process that establishes morally defensible conditions for dispute resolution and arrives at an outcome whose content is morally defensible.³

The terms of deliberation need not be explicitly moral. It may be more effective to avoid explicitly moral language in many deliberations. But the criteria that we use for identifying a *justifiable* resolution to a moral conflict must be moral, and moral criteria extend to both the conditions under which a decision is reached and the content of the decision itself, the means and the ends of decisionmaking. There is no morally neutral way of resolving a moral conflict in politics, either procedurally or substantively. The rest of this Essay explores the implications of the impossibility of moral neutrality. The most basic implication is that any response to a moral

² See *id.* at 4 ("The moral authority of collective judgments about policy depends in part on the moral quality of the process by which citizens collectively reach those judgments.").

³ See *id.* at 199–229.

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conflict in politics must be justified on moral terms that encompass both the means and the ends of the response.

II. LETTING THE MAJORITY DECIDE

Let us begin with the most popular procedural understanding of how to resolve moral conflicts: let the majority decide. To count as a minimally moral procedure, majoritarianism must say more than “let the majority decide.” All majoritarians do say more. The most defensible frameworks insist that a society enfranchise all resident adults, that they secure their freedoms of speech and association, that they secure due process of law, and that they secure the other conditions that help to ensure that the electorate is inclusive and the will of the majority is real rather than manipulated. If, as is the case in every representative democracy, political representatives are elected to resolve political disputes on behalf of ordinary citizens, the representatives must be accountable to the people in whose name they decide.

The great virtue of majoritarianism is that its voting procedures express the idea that all adults are free and equal citizens. To see the limits of majoritarianism as a decisionmaking procedure, let us suppose that the basic conditions of a fair majoritarian procedure for resolving a moral conflict are in place. The decision of a majority (or their accountable representatives) at any particular time resolves the moral conflict as a matter of law or policy.

What is the strongest justification for the majoritarian framework for resolving moral conflicts in politics? Only majority rule on its face treats everyone as equal. To let a minority decide is not to accord equal respect to the moral claims of each person. This answer is good as far as it goes but it does not go far enough. It creates a problem for majoritarianism taken on its own terms. The problem is that majority rule may not, and often does not, respect the moral claims of each person, which is its basic moral premise. It is especially vulnerable to neglecting the moral claims of members of a minority. A simple example can clarify this problem and the way it should influence our search for a more justifiable response to moral conflict in politics.

Imagine yourself with four other people in a railway car. I am one of the four other people.⁴ None of us can leave, some of us wish to smoke, and some of us object to anyone smoking in our presence. How should the

⁴ See *id.* at 11–51 (providing further analysis of the railway car examples).

conflict be resolved? Majoritarianism has a simple answer: "Let's vote." The appeal of letting majority preference determine the outcome, as Brian Barry describes it in his essay *Is Democracy Special?*, is that

quite persuasive arguments can be made for saying that the decision should not simply reflect the number of people who want to smoke as against the number who dislike being in the presence of smokers. But, since opposing principles can be advanced, the existence of relevant principles does not seem to offer a sound basis for resistance to a majority decision.⁵

Barry imagines the Archbishop of Canterbury among us, claiming "the right to decide the smoking question on the basis either of his social position or on the basis of his presumptive expertise in casuistry."⁶ If some of us reject his claim, how should the question be settled except by a vote? If the Archbishop finds himself in the minority, he has failed to convince enough of us that he is right or that he has the right to decide. He may insist that his view should have been accepted, but in the face of actual rejection of the minority views, the case for deferring to the majority decision still looks strong.

Does the case for simple majority rule look as strong if we start to introduce some realistic complexity into the railway car example? Consider this variant on the original example. Two passengers—you and I—argue as follows: "Nonsmokers should not be subject to the substantial health risks of passive smoking, and smokers are also harming themselves by smoking. So it is in no one's interests to smoke in this railway car." The vote is taken, and we, the two health-minded passengers, lose, three to two. If the health risks are minor and uncertain, the case for majority rule still looks strong. But if you and I have severe cases of asthma, and the risks to our lives are great, the case for majority rule weakens. Our confidence in majority rule declines as the health risks increase in severity and likelihood.

The appeal of majoritarianism depends on conditions of moral conflicts in politics that are rarely satisfied. One condition is that a majority must not ignore people's vital interests, and more precisely, their basic liberties and opportunities. Decisions that violate basic liberty and opportunity cannot be justified simply by virtue of the fact that they result from majority rule. Majority rule may still be the best procedural standard for resolving many

⁵ BRIAN BARRY, *Is Democracy Special?*, in DEMOCRACY, POWER AND JUSTICE: ESSAYS IN POLITICAL THEORY 24, 30 (1989).

⁶ *Id.*

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political disputes, but there is no reason to believe that it is a sufficient standard.

III. DELIBERATING BEFORE DECIDING

To say that majority rule is not a sufficient standard presupposes that some more sufficient standard can be found that is constrained or constrains itself in a way that reduces the chances of decisions that violate basic liberties and opportunities of individuals. How can any process be constrained or constrain itself to reduce the chances that the resulting decisions will violate basic liberties and opportunities of individuals?

Let us consider the railway car example once again and modify it slightly. Suppose you are a doctor and have specialized knowledge about the health risks of smoking. I am a political philosopher and have no specialized knowledge. I am undecided about whether smoking should be permitted in the car. I want to hear more from you about the pros and cons of the issue before I vote. And I want other people to hear what you have to say as well. No one objects to majority rule, but you and I object to the idea of simply taking a vote. We both think it important to discuss the substance of the question before anyone casts a vote.

Procedural principles such as majority rule are silent about the following aspects of decisionmaking that often are of critical moral importance in politics: the evidence, arguments, and claims that are considered before a vote is taken. It would be a serious mistake to judge conflict resolution only by its voting rules and not also by how the decisionmaking is designed and by whether decisionmakers are encouraged to deliberate about their disagreements before voting.

When we judge moral conflict resolution in politics, we should pay attention to what kind of discussions take place, who engages in them, the quality of their arguments, and whether and how people respond to each other. Deliberation is an indispensable part of any political process that seeks justifiable resolutions to moral disagreements. It is indispensable for at least two important reasons. One reason is instrumental: deliberation increases the chances of arriving at morally good outcomes. The second is noninstrumental: by their willingness and ability to take their opponents' views seriously, participants in a moral conflict demonstrate mutual respect for one another. Such mutual respect is intrinsically valuable within a democracy, because democracy itself rests on the ideal of government expressing respect for the moral claims of each person.

Most versions of proceduralism do not so much reject as neglect deliberation. They fail to recognize how *morally* important it is for decisionmakers to engage in the give and take of discussion, reason giving, and evidence sharing before they make their decisions, whatever vote-counting method they use. Frameworks of dispute resolution typically are far better in making explicit the importance of engaging in a deliberative process, which entails back and forth discussion, reason giving, and evidence sharing among the disputing parties or their representatives. Among the procedural steps that Roger Fisher, Elizabeth Kopelman, and Andrea Kupfer Schneider recommend in *Beyond Machiavelli* for trying to resolve conflicts are to “step into their shoes” and to “find good reasons for what others are doing.”⁷

But there are also limits to what can count as morally good reasons, and these are less well recognized—sometimes not recognized at all—by defenders of dispute resolution. Fisher and his colleagues consider the example of the paramilitary Serbs in July 1993.⁸ From the paramilitary Serb perspective, the bad consequences of yielding to the United Nations’ demand for a cease-fire included the following responses: (1) “I abandon the cause of Greater Serbia for which many have died”; (2) “We gain no more territory”; (3) “We will have to yield some territory won in battle”; and (4) “The [United Nations] may arrest and try me as a war criminal.”⁹ The only good consequence from the perspective (as Fisher imagines it) of the paramilitary Serbs is that “[t]he terrible fighting stops.”¹⁰ So far, there is nothing to be said against, and everything to be said in favor of, understanding the perspective of the disputants on the Serb side of the conflict. The problem emerges when we ask: where should we go from here?

The aim of Fisher’s dispute resolution technique is for those of us who oppose the paramilitary Serbs to find a proposal that for them, as for us, is “yesable.”¹¹ By “yesable,” Fisher means two things. One is an important insight of Fisher’s technique: the proposal is concrete enough that the other side can simply say “yes” and does not need to construct its own terms from scratch (or ideally even modify our terms).¹² But another thing that

⁷ ROGER FISHER ET AL., *BEYOND MACHIAVELLI* 64 (1994).

⁸ *See id.*

⁹ *Id.* at 65.

¹⁰ *Id.*

¹¹ *Id.* at 96.

¹² *See id.* at 97.

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Fisher means is less explicit: the proposal need only be agreeable to both sides to yield a resolution.¹³ Agreement is a necessary and sufficient standard of dispute resolution, according to Fisher's framework.¹⁴ In other words, Fisher's framework of dispute resolution is not a moral one. It does not claim or even aim to yield a fair resolution.

The problem with Fisher's framework is that it is not difficult to imagine a situation where a "yesable" proposal is presented to the Serb paramilitary forces that is morally indefensible. A "yesable" proposal could be one that appeases Slobodan Milosevic and radically discounts the vital interests of the Kosovo Albanians. In what sense should we say that under such conditions the moral conflict is "resolved"? A proposal that is "yesable" on Fisher's terms is not necessarily a justifiable proposal, and a moral conflict that is "resolved" on immoral terms is not really resolved. We could say that the fighting has ended, but we cannot say that the moral conflict is thereby resolved.

To his credit, Fisher makes this clear when he discusses the way his framework does not necessarily integrate ethical standards,¹⁵ but in making it clear, he does not follow the logical implications for dispute resolution that remains so purely procedural. Fisher makes clear that one cannot dismiss ethical standards simply because people disagree about them: "Ethical standards, like legal ones, cannot be dismissed as irrelevant because of differences of opinion."¹⁶ This is a great advance over moral subjectivism. The problem is that Fisher does not draw the logical lesson from his own insight. "Yesable" proposals may be morally indefensible and therefore bad, indeed pernicious, proposals. His framework remains too purely proceduralist.

The insight that Fisher shares with most deliberative democrats is that many moral differences are reasonable ones, which best can be resolved by deliberative means.¹⁷ A lot of conflict is not bad but rather is productive of a better state of affairs than would be the case in the absence of conflict. This is because people can learn from their differences and in so learning can arrive at better resolutions to moral conflicts in politics (as in personal life) than had their differences never come to light.¹⁸ In *Democracy and*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.* at 111.

¹⁶ *Id.*

¹⁷ See *id.* at 111–12.

¹⁸ See *id.*

Disagreement, Dennis Thompson and I discuss the case of the Oregon Health Services Commission ("Commission"), which, after an extensive process of public deliberation, produced a better outcome—including greater awareness of how poorly the health care needs of poor citizens were being met, thereby placing pressure on the legislature to increase and improve health care funding for poor citizens—than was the case when the Commission relied upon an expert panel of policy analysts.¹⁹

"Differences can be a source of value," Fisher writes.²⁰ Any defender of deliberation should agree. But we all should also explicitly recognize, as Fisher does not, that differences in politics—when they are of the sort that divide the paramilitary Serbs, the Kosovo Albanians, the North Atlantic Treaty Organization (NATO), and the United States—can be a source not of value but of grave injustice, the source of policies of appeasement of those engaged in ethnic cleansing, or the source of a war whose means and ends are extremely difficult to assess ahead of time. The point is not to criticize dispute resolutions that try to end such conflicts. Quite the contrary, trying to end such conflicts is often a noble cause. The point is that depending on what the opposing sides are willing to do in response to their differences, the response to the conflict may or may not be justified even if it is a "yesable" response in Fisher's terms. The terms are amoral, and therefore leave the door fairly wide open to agreements that further rather than fight injustice.

Another way of putting this same point is that the best alternative to a negotiated agreement (BATNA) in politics sometimes may be very costly in political terms for the public officials who are in charge of the negotiations. But the BATNA may still be a morally better response than continued negotiations—to a ruthless tyrant, for example, who has demonstrated that he is intent on engaging in ethnic cleansing unless he is forcibly prevented from doing so. An immoral negotiated resolution to a moral conflict in politics may be worse than going to war or no resolution at all.

All proceduralists agree that procedures should be constrained by procedural values such as free speech. But if our aim is to resolve moral conflict as justifiably as possible, we should not limit ourselves to procedural constraints. The railway car example shows that some decisions consistent with procedural constraints—imposing life-threatening health risks on a few people for the sake of satisfying the preferences of the greater number—may not be justified. When we move into the real world,

¹⁹ See GUTMANN & THOMPSON, *supra* note 1, at 143.

²⁰ FISHER ET AL., *supra* note 7, at 143.

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it is all the more important to recognize this. Insisting on respect for the freedom of religion of minorities, for example, is not a procedural constraint on conflict resolution. Yet it is an important constraint to consider when the conflict threatens freedom of religion. Conversely, some procedural resolutions of the conflict in Kosovo—such as giving in to Milosevic's demands for a cease-fire without any assurance of security for the Kosovo Albanians—could be worse than no resolution at all.

The railway car example shows that we need to attend to the content of the conflict to assess the justifiability of both the means of reaching a resolution and the resolution itself. When considering how to resolve moral conflicts, the core ideal of democracy—that everybody's *moral* claims be respected—requires us to assess the morality of the claims that people within a conflict make, and not only to assess the procedure by which the conflicts may be resolved. A conception of conflict resolution can and should do better than to be only procedural. This point—of a conception of deliberative democracy that integrates standards of both means and ends—is paralleled by frameworks of conflict resolution that, unlike Fisher's, are explicitly moral. Joseph Stulberg presents such an alternative framework of dispute resolution in *Fairness and Mediation*.²¹

IV. MAXIMIZE SOCIAL WELFARE

Let us now consider another, less procedural response to moral conflict: utilitarian policy analysis.²² Utilitarian policy analysis seeks to maximize social welfare. Utilitarianism works very well when there exists a Pareto optimal resolution to a moral conflict, a resolution in which one or more people are made better off and no one is made worse off. But there are precious few Pareto optimal solutions to moral conflicts in politics. (And when more than one exists, there is another problem of choosing among them. I will not pursue this problem because the other problem is so much more serious for politics.)

Maximizing social welfare seems to be a morally attractive goal for policy makers who are faced with moral conflicts because it requires them to follow the seemingly democratic Benthamite rule: count everyone's interests as one and no one's as more than one. Although this seems to be a very democratic method, it fails as a defensible substitute to proceduralism,

²¹ See Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 909–10 (1998).

²² See GUTMANN & THOMPSON, *supra* note 1, at 165–98 (discussing utilitarian policy analysis).

and it is not even a defensible supplement to it in those cases where what is at issue is whose interests are to be counted and how the satisfaction of interests across individuals is to be distributed.

Consider the conflict in the United States Congress over subsidizing abortion. Since the *Roe v. Wade*²³ decision in 1973, Congress has voted more than hundreds of times on abortion. Many of these votes have been about abortion funding for poor women. The rule—deliberate before deciding (and then reiterate deliberation, if the moral conflict persists)—is a good one. But it alone does not tell us what the content of the standards or arguments offered to resolve the conflict should be. Deliberative frameworks undermine their claim to provide more justifiable resolutions to moral conflicts than nondeliberative frameworks if they say that the content of the deliberation does not matter. Why then bother to deliberate in the first place? We could just as well save ourselves a lot of time, flip a coin, and get on with whatever the coin toss tells us to do. One important reason to engage in deliberation is to reach more justifiable decisions. As deliberators, we therefore need to bring some standards to the deliberations.

Utilitarians sensibly say that flipping a coin would be irrational in most cases. We instead should engage in a cost-benefit analysis and make the most cost-effective use of government funds. This too sounds sensible. And it sometimes is sensible. But utilitarian policy analysis often begs rather than answers the question of how to resolve a moral conflict on terms that are as defensible as they can be to the people who will be bound by the resolution.

Here is a vivid example of a deliberative argument whose content is a kind of cost-benefit analysis and which illustrates the inappropriateness of cost-benefit analysis for resolving some kinds of moral conflicts in politics. In an early floor debate on renewal of the Hyde Amendment, which restricted abortion funding under Medicaid to abortions that threatened the life of the mother, Representative William Dannemeyer made a cost-effectiveness argument against funding abortions. This is what he said:

If we are going to pay off this debt, somebody has got to be born to pay the taxes to pay it off. Now, since 1973, the decline in the birth rate per fertile female has reached the point where, as a civilization, we run the serious risk of disappearing from the face of this planet.

Right now, today, in the last few years, the rate of reproduction per fertile female is 1.8. Now, demographers tell us we need 2.1 to sustain a

²³ 410 U.S. 959 (1973).

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civilization. If we keep on at this rate by the year 2050, the number of people in this country will begin to decline in absolute terms. The percentage of elderly will rise and the percentage of young will decline. Our social security system is in a growing peril. . . .

The economic consequences of a moral issue should not be permitted to resolve the matter, but at the same time, to ignore them completely is not a correct discharge of our responsibilit[ies].²⁴

Representative Barbara Mikulski passionately and reasonably replied:

Mr. Chairman, I am just appalled at what the last speaker said. I had an outline of remarks to be made, but now I am shocked to hear that American women are meant to be breeder reactors to sustain civilization and pay off the deficit. I am insulted—insulted—by the use of the language that was used here in this debate.

We are talking about matters of life, we are talking about the right to an abortion that has been allowed under the Constitution of the United States. And then to refer to American women as fertile females that need to sustain the civilization is an affront to us. I think American women do more than breed; I think that American women do more than pay off the deficit. We have already paid our share and pay our dues. We are not even included in the Constitution of the United States. But, boy, we sure know how to stick it to the American women in the appropriations.²⁵

Even on its own utilitarian terms, Representative Dannemeyer's reasoning is faulty. Funding abortions is likely to be much cheaper for the government than not doing so. The cost of an abortion is a small fraction of the cost of childbirth, and other costs and benefits—such as adoption, welfare, and much more—would need to be taken into account before a conclusion could be reached on utilitarian terms as to whether to fund abortions for poor women.

But this is not the main problem with Dannemeyer's argument or with the utilitarian framework for conflict resolution more generally. Even if we suppose that the costs of childbirth are greater than those of abortion, this in itself would not be a sufficient reason to favor funding abortions. The utilitarian calculus of costs and benefits is not an adequate way to resolve the conflict over funding abortions and many other moral conflicts because the calculus cannot even get started until we decide whose interests are to

²⁴ 129 CONG. REC. 25,409–10 (1983); *see also* GUTMANN & THOMPSON, *supra* note 1, at 82–83.

²⁵ 129 CONG. REC. 25,410 (1983).

be included in it.

The utilitarian framework does not give us a justifiable decision on whether and how the unborn and future generations more generally should be included in the calculus. If we include the unborn and future generations, the utilitarian conclusion will be very different from the conclusions of a calculus that excludes the unborn partially or completely. We cannot simply assume that producing more people in the world is better as long as they maximize the happiness in the world. If we did assume this, then we could justify using women as "breeder reactors."²⁶ Take away this unjustified assumption, and utilitarianism is not an adequate framework for resolving many moral conflicts even within an established democratic process such as legislative decisionmaking.

V. RESPECT INDIVIDUAL RIGHTS

Constitutional democrats offer an antidote to both proceduralism and utilitarianism: respect for individual rights. A justifiable resolution to a moral conflict, they argue, should respect as far as possible the *moral* claims of *every* individual—not just those of the majority. A decision procedure will therefore be more justifiable to the extent that it is constrained or constrains itself to respect the rights—the basic liberties and opportunities—of individuals. This is a substantive standard of moral conflict resolution. It parallels what Stephen Goldberg, Frank Sanders, and Nancy Rogers call rights-based mediation, which they aptly contrast to interest-based mediation.²⁷

The major strength of the substantive standard—respect individual rights—is the recognition that some procedurally correct decisions may not be justifiable even though they are procedurally correct. Chamberlain's appeasement of Hitler is one historical example. A negotiated settlement of the Kosovo conflict that completely discounts the vital interests of the Kosovo Albanians would be another, if some better alternative is available (and we cannot exclude the alternative of continued fighting). Unjustifiable alternatives include those that fail to secure as far as possible the most basic liberties or opportunities of the individuals who are most affected by the ongoing conflict and its resolution. The aim of protecting individual rights

²⁶ *Id.*

²⁷ See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 104 (1992).

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is a necessary part of any justifiable framework for resolving moral conflicts.

But it is not sufficient, and neither, therefore, is a purely rights-based framework of response to moral conflict. The problem with relying on the invocation of protecting individual rights is that many moral conflicts in politics are about precisely this: what are the rights that must be protected? What does protecting basic liberties require of us in practice? To answer this question, we need to go back into the railway car. Suppose you and I vote against smoking. The majority votes to permit smoking. Does this count as violating our basic rights, protecting the rights of smokers, or neither? Are my rights violated if smoking is likely to cause me to get moderately sick? Or only if it causes me to get violently ill? Or only if I will die? Does it matter if I am the only asthmatic? Would it make a moral difference if you also share the same nonlife-threatening problem with me, but we are both still in the minority?

These questions about what constitutes our basic liberties and opportunities have direct parallels in actual politics: do public policies that limit environmental pollution protect a basic liberty (to breathe clean air) or violate a basic liberty (to protect property owners from uncompensated takings)? How clean does the air need to be to protect our basic liberty to breathe clean air? Do the numbers of people who are likely to die from cancer matter? Is avoiding one cancer death enough to justify pollution controls? Or consider an even more contentious issue these days: is it within the rights of a public university to use race as one criteria among many to choose a student body, as Justice Powell argued in the *Regents of the University of California v. Bakke* decision?²⁸ Or does the use of race for the sake of diversity violate the rights of students who are therefore denied admission, as Judge Smith argued for the United States Court of Appeals for the Fifth Circuit in the *Hopwood v. Texas* decision?²⁹ If you think that the *Hopwood* decision was wrong, what about the *Bakke* decision? Was Justice Powell correct in arguing that racial quotas violate rights but racial goals do not?³⁰ Was he right to argue that race can be one among many

²⁸ See *Bakke v. Regents of Univ. of Cal.*, 438 U.S. 265, 318 (1978) (stating that “[n]o . . . facial [intent to discriminate] exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process”).

²⁹ See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“[T]he classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.”).

³⁰ See *Bakke*, 438 U.S. at 315–18.

criteria but not the sole criteria for university admissions?³¹ A framework of securing individual rights must take a position on these issues, but any position will re-create the moral conflict involved here rather than resolve it.

Whether it is the problem of environmental pollution or affirmative action, the core problem is not simply that we need more facts to resolve these conflicts. More information would no doubt help. For example, the publication of William Bowen and Derek Bok's path-breaking empirical study on affirmative action in selective universities, *The Shape of the River*, helps resolve some contentious issues surrounding affirmative action,³² but it does not by itself resolve the moral conflict. (One of the great virtues of the symposium issue of the *Ohio State Law Journal*, *Twenty Years After Bakke*, is that it raises as many questions concerning rights and affirmative action as it answers.³³) Even with the most complete information that we can obtain, someone still has to decide whether and why a certain type of affirmative action or a certain level of risk of environmental pollution does or does not violate individual rights.

We should expect wide differences of reasonable opinion about these and many other important issues concerning basic liberty and opportunity. Do our basic liberties include the legalization or prohibition of prostitution, capital punishment, and drugs (and which drugs)? Do our basic opportunities include the funding of abortion for poor women and the legalization of affirmative action (and for which groups)? Even if we can agree on the need for rights to welfare, health care, education, and police protection, we cannot agree on how much health care, education, and police protection is enough to respect individual rights. A rights-based framework for resolving moral conflicts in politics is necessary but not sufficient.

VI. COMBINING PROCEDURAL AND SUBSTANTIVE STANDARDS

We should be suspicious of any framework of conflict resolution that promises us determinate answers to these and many other questions that create moral conflict in democratic politics. We should be equally

³¹ See *id.* at 318, 320.

³² See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 275-90 (1998).

³³ See generally Symposium, *Twenty Years After Bakke: The Law and Social Science of Affirmative Action in Higher Education*, 59 OHIO ST. L.J. 663 (1998).

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suspicious of any framework that is purely procedural and therefore rejects substantive constraints such as respect for basic liberty and opportunity unless it offers us a good moral argument for so doing. We should seek and support the best possible deliberative procedures for resolving moral conflicts in politics, and we should also recognize—barring an argument that shows otherwise—that the most justifiable deliberative procedures are not only procedural or only rights-based. If deliberative procedures, basic liberties, and opportunities are not at issue, a calculation of costs and benefits may be entirely appropriate (and it may even be appropriate as a possible way of collectively deciding how to judge the merits of competing procedures, liberties, or opportunities).

How moral conflicts are resolved is a matter of moral importance. Part of the moral importance is instrumental: the extent to which decisionmakers reach a resolution that respects the basic liberties and opportunities of individuals matters. Part of the moral importance is intrinsic to the deliberative process itself: the extent to which the decisionmakers mutually respect one another and consider what the people who will be most affected by their resolution have to say. Both the moral importance of mutual respect and the incentive to be mutually respectful increase with our interdependence over time. If the railway car passengers are also fellow citizens outside the car, their incentive to cultivate mutual respect inside the car will be greater. Finding ways of increasing the incentives to cultivate mutual respect is important because, even apart from its instrumental value in producing better decisions, there is a moral value to the expression of mutual respect among free and equal beings.

A deliberative framework for responding to moral conflicts, as the railway car examples suggest, needs to combine both procedural and substantive standards. The starting premise of a deliberative framework is that moral conflicts can be resolved only on morally defensible terms. Moral terms, as we have seen, are both procedural and substantive. (The dichotomy between process and substance itself is misleading, but that is the subject of another paper.³⁴)

In the domain of moral conflict in politics, it is therefore a serious moral mistake to respond as ambiguously as Roger Fisher and William Ury do in *Getting to Yes* to the question: “Should I be fair if I don’t have to be?”³⁵ They respond: “We do not suggest that you should do good for the

³⁴ See Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy Is Different*, 17 SOC. PHIL. & POL’Y (forthcoming 2000).

³⁵ ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 154 (Bruce Patton ed., 2d ed. 1991).

sake of being good (nor do we discourage it). . . . [S]ometimes you may have an opportunity to get more than you think would be fair. Should you take it? In our opinion, not without careful thought.”³⁶ He goes on to ask: “How much is the difference worth to you?”³⁷

“Should I be fair even I don’t have to be?” should not be a difficult question for a theorist of conflict resolution in politics to answer. Politics is about wielding power over other people, and surely those other people are entitled to a justification for the power that is wielded over them. Milosevic *should* be fair, even if he does not have to be, and even if he cannot be forced to be. So should NATO and the United States be fair, as fair as they can be to the people whose lives are most affected by their political decisions. Each and every one of us should be fair when we make political decisions, decisions that are binding on other people. Fair does not mean self-effacing. Fair means taking everyone’s—including our own—legitimate interests into account in deciding.

Standards of dispute resolution, both procedural and substantive, are often morally controversial. The fact that a standard is controversial, as Fisher recognizes, is no reason to reject it. But it is a reason to recognize that including standards of protecting basic liberties and opportunities as part of a framework for resolving moral conflicts in politics is no more problematic on its face than including only procedural standards such as looking behind people’s opinions to their interests. The question in both cases is whether these standards are the best we can do in designing a framework for guiding moral resolutions of moral conflicts in politics. One important reason among many for accepting a deliberative framework is that it explicitly includes a standard of subjecting itself to deliberative dispute. That dispute must allow for both procedural and substantive reasons for accepting, rejecting, or revising the proposed framework.

We have no better alternative than to deliberate with one another and our fellow citizens about how we most justifiably can resolve moral conflicts. In deliberating, we have no better alternative than to consider both procedural and substantive standards. Sometimes these standards may conflict, as when a majority decides to violate what you take to be a basic liberty, in which case you can assess the relative value of conflicting standards within a deliberative process. You can do so without prejudging whether the deliberative result—permission to smoke on the railway car, for example—takes priority over your moral assessment of the result, that

³⁶ *Id.* at 154–55.

³⁷ *Id.* at 155.

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smoking violates a vital interest of some passengers without furthering an equally vital interest of the majority. You also can judge the deliberative process itself by how well it affirms and supports standards—such as procedural fairness in deliberating and respect for the vital interests of individuals—that both support the process and also inform it.

VII. CONCLUSION

Returning to the question with which I began: what is a justifiable way of resolving moral conflicts in politics? Of one conclusion I am confident: there is no easy answer. I have offered some reasons that help explain why this is so and why three of the most common answers to this question are inadequate in different ways and to differing degrees. I also have suggested that when we seek a resolution to moral conflicts in politics, we should seek a moral resolution in both procedural and substantive senses of the term moral. This is not to assume that there is one and only one justifiable resolution of a moral conflict. Quite the contrary, there often are multiple moral resolutions. But not all ways of settling moral conflicts are moral. When we judge people who wield political power, or who advise people who wield political power, we should expect them not just to find a way to settle or stop the conflicts. We should expect them to reach a moral resolution if at all possible: one that is justifiable (as far as possible) to the people who will be bound by the resolution. If public officials cannot reach a moral resolution, it is not at all obvious that stopping a conflict is better than letting it continue.

People with power often have a personal interest in convincing us that a moral resolution to a moral conflict is not possible. But the very act of trying to persuade us that they could not possibly find a moral resolution pays homage to the view that seeking (and offering) a moral response to moral conflict is desirable, if only it is possible. Deliberative dispute resolution in politics, guided by procedural and substantive standards, does not call for moral perfection any more than it calls for peace on any terms. Instead, it calls upon people who wield political power to find ways, moral ways, to avoid the ever-present possibility of—and temptation toward—injustice in politics. There are no other ways to avoid injustice but moral ways, and these ways bring considerations of process and substance, means and ends, together through deliberation.

We even need to deliberate in order to know when not to deliberate. When will deliberation no longer work? When is it better not to deliberate? In many situations, deliberation may be the best alternative. But is there a

better way to justify not deliberating—and therefore not engaging in the actual process of mutual justification—than by deliberating and thereby justifying the absence of deliberation to the people who will be bound by the (nondeliberative) decision? The best chance of resolving moral conflicts in politics is to deliberate about the morality of means and ends, including the morality of not deliberating in some situations.